No. 2569

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD D. THOMAS COMPANY, a Corporation,

Petitioner,

vs.

WM. H. BEHARRELL, WM. C. ALVORD and ELLIOTT CORBETT, as Trustees in Bankruptcy of the Estate of I. GEVURTZ & SONS, Bankrupt,

Respondents.

In the Matter of I. GEVURTZ & SONS, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

In the United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of I. GEVURTZ & SONS,
Bankrupt.

Petition for Revision of the Order Refusing Howard D. Thomas Company Permission to Liquidate Claim.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Howard D. Thomas Company, a corporation, organized and existing under the laws of the State of Washington, respectfully shows unto the Court:

I.

That on the —— day of May, 1913, I. Gevurtz & Sons, a corporation, was duly adjudged a bankrupt, by the District Court of the United States for the District of Oregon; that thereafter Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, were duly elected and qualified, and have ever since been and now are acting as trustees in said bankruptcy proceedings.

II.

That thereafter on September ——, 1913, petitioner filed its proof of claim in bankruptcy as a general creditor in the usual and approved form, and later on November 22, 1913, filed its petition for leave to withdraw said proof of claim, which said last mentioned petition was duly allowed.

III.

That promptly upon the entry of the order allow-

ing said withdrawal, petitioner filed its Petition in the District Court of the United States for the District of Oregon asking leave to liquidate its claim against the bankrupt, which Petition, omitting heading and formal parts, is as follows:

(Petition for Leave to Liquidate Claim.)

"Your petitioner, Howard D. Thomas Company, respectfully represents:

1.

That it is and at all times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

2.

That your petitioner has had business dealings with the bankrupt for some time prior to 1913, but that petitioner had sold bankrupt only significant amount of goods during the months of January, February, and March, 1913, because of the fact that petitioner knew of the slowness of bankrupt in meeting its obligations and was reluctant to extend any substantial credit to the bankrupt.

3.

That in the month of April, 1913, one Philip Gevurtz, then President of the bankrupt, applied to petitioner for a large amount of immediate credit, to wit, the immediate shipment of rugs of the value of between three and four thousand dollars. That at the time of receiving said application, petitioner had learned that the bankrupt was tendering a proposition to its creditors, looking toward the procuring of an extension for a period of months and years for

the payment of its large accounts and bills payable, and was for this reason and because of the reluctance hereinbefore referred to unwilling to extend credit to the bankrupt, but that petitioner was at said time assured and told by the said Philip Gevurtz that said extension on the part of the large creditors had been practically secured and that a Portland bank had agreed to advance the sum of $100,000 to the bankrupt and that it had been arranged between the bank and the bankrupt that one Hexter should become connected with the bankrupt concern and that this money would suffice to pay all small outstanding bills of the bankrupt at once and enable the bankrupt, in view of the extension hereinbefore referred to, promptly to meet current obligations; that the said Philip Gevurtz further stated to petitioner at said time that the bankrupt had already procured from the bank a part of the agreed amount and that arrangements had been made for the payment of the balance during the following week.

4.

That your petitioner believed and relied upon the said statements of facts upon the part of said Philip Gevurtz, and that the same constituted material inducements for the shipment of the goods referred to and that said goods would not have been shipped by petitioner but for the supposed truth of the facts stated by the said Philip Gevurtz; that as a matter of fact neither at said time or subsequently had any such arrangements been perfected by or on behalf of said bankrupt, as stated by the said Philip

Gevurtz. That all of said representations were wholly false.

5.

That your petitioner believing and relying upon the truth of said representations as aforesaid, shipped to bankrupt during the month of April, 1913, rugs of the agreed and reasonable value of Three Thousand Nine Hundred and Seven and 36/100 ($3,907.36) Dollars, and that within a period of three weeks from the average date of shipments by the petitioner to the bankrupt, said bankrupt was adjudicated as such in the above-entitled Court and cause; that a few days prior to said adjudication, the bankrupt returned to the petitioner portions of said shipments amounting to the sum of Two Thousand Nine Hundred and Eleven and 60/100 ($2,911.60) Dollars, and that rugs to the amount of Nine Hundred and Ninety-six and 26/100 ($996.26) Dollars were retained by or sold by the bankrupt or by the trustees in bankruptcy.

6.

That your petitioner thereafter and without knowledge at said time of the falsity of the representations hereinbefore referred to filed its proof of claim for said Nine Hundred and Ninety-six and 26/100 ($996.26) Dollars, and upon objection being made to said proof of claim by the trustees in bankruptcy, on the alleged ground that petitioner had received a preference in the shape of said returned goods, the President of your petitioner, Howard D. Thomas, attended the taking of testimony at the office of Chester G. Murphy, Esq., Referee in Bank-

ruptcy, to whom the cause had been referred, and upon said date of the taking of said testimony, learned for the first time, through inquiries, of the total falsity of said material representations.

7.

That your petitioner was thereupon advised that the proper procedure was by means of a petition of the nature of this pleading, and for the purpose of filing same requested permission to withdraw the said proof of claim, which said permission was accordingly granted by said referee.

8.

That your petitioner is advised and therefore avers that under the facts stated, it became, was and is entitled to rescind the sale, thus fraudulently procured and reclaim its rugs, with damages for such as cannot be returned, but that it is necessary to procure the consent of this Honorable Court and the direction of the Court as to the method of liquidating its said demand against the bankrupt, as a condition precedent to the filing of its claim.

WHEREFORE, your petitioner prays that it may be permitted to liquidate its said claim against the bankrupt for the sum of Nine Hundred and Ninety-six and 26/100 ($996.26) Dollars, growing out of the damage resulting to petitioner through said false representations and through its shipment on the strength thereof, in whatever manner, time and place this Honorable Court may direct, and that upon the liquidation of its said claim, if said claim be found to be proper, that the amount adjudged to petitioner as the result of said liquidation may be made the

basis of proof of claim against the bankrupt by the petitioner as a general creditor, to the extent of such liquidated amount, and that petitioner as such general creditor, may participate in the dividends in bankruptcy herein."

IV.

That a motion to dismiss said petition was filed by the trustees in bankruptcy herein on the alleged ground that it did not state facts sufficient to show a right of liquidation; and said matter was thereafter, on March 2d, 1914, referred by said Court to A. M. Cannon, Esq., as Special Master, said Order (omitting heading and formal parts) being as follows:

(Order Referring Petition to Master.)

"This matter came on to be heard upon the motion of Chris. A. Bell, of counsel for trustees, for an order to dismiss the petition to liquidate claim of Howard D. Thomas Company, whereupon it is ordered that said motion, together with the petition of the Howard D. Thomas Company, to liquidate claim, be referred to A. M. Cannon, Esq., as Special Master to take such testimony as may be necessary in said matter and to report the same back to this Court together with his findings thereon, both of law and of fact, with all convenient speed."

V.

That thereafter, the said A. M. Cannon, Esq., as Special Master, filed a report showing his Findings of Fact and Conclusions of Law, which said Report, omitting heading and formal parts is as follows:

(Report of Special Master.)

"STATEMENT OF FACTS.

In April, 1913, the bankrupt applied to the petitioner for the purchase of a lot of rugs, invoice of which was upwards of $3,000. At the time this order was given and the sale made the bankrupt was in difficulties with its creditors, was heavily involved and far in arrears with current merchandise bills. Negotiations had theretofore been had, and were at the time pending, with the First National Bank for securing funds sufficient in amount to take up and discharge all outstanding small merchandise bills, thus enabling the bankrupt to continue its business without being hampered. Probably at the suggestion of the bank, an expert accountant was then in the bankrupt's store engaged in making a technical estimate of its assets and liabilities, and a committee of three financiers, whether working under the direction of the bank does not appear, was acting in an advisory capacity with the bankrupt's officers. Two of this committee were prominent officers in the First National Bank and heavily interested in that institution. These negotiations had progressed far enough, as, I believe, to induce the officers of the bankrupt genuinely to believe that the bank intended to, and would, in a very short time, supply it with $100,000.00, or so much thereof as was necessary to discharge its current merchandise obligations. Indeed, I believe some money had already been advanced for this purpose.

In this situation, Philip Gevurtz, President of the

Bankrupt, called Howard D. Thomas, President of the petitioner, over the phone at Seattle and placed the order for the rugs in question. In this conversation Thomas at first declined to honor his order, telling Gevurtz that his firm was slow in paying bills, that they had failed to pay bills long past due, and that he would not ship the goods unless absolutely certain that Thomas & Company would receive its money. To this Gevurtz replied, in substance, that they were absolutely certain of paying the bill because they had made arrangements with the First National Bank to advance them $100,000 for the purpose of paying their pressing obligations, which would supply them with sufficient capital to run the institution along. He understood to absolutely guarantee that Thomas & Company would be paid, and with this assurance Thomas agreed to ship the goods.

I think there is no doubt that upon this occasion Philip Gevurtz was acting in entire good faith and believed, with good reason, that negotiations with the bank were practically certain to result as contemplated and that at this date the Gevurtz corporation fully expected the bank to step in and advance sufficient funds to put them upon their feet. I find no evidence of fraud or bad faith in his conduct.

Within about thirty days from the date of the shipment negotiations with the bank, for some reason, fell through and bankruptcy was precipitated. Within four or five days before the petition was filed, Philip Gevurtz called Thomas & Company up on the phone and explained to them that they were in trouble and wished to return the rugs. Mr.

Thomas who is the manager and sole owner of the company, was absent in the East at the time and those in charge in his absence told Gevurtz they had no authority to receive the rugs back and that if they were shipped it must be upon the responsibility of Gevurtz & Company. However, their traveling salesman came down to confer with the bankrupt and, while here, this party was informed by Philip Gevurtz of the reason for wishing to return the rugs, which was that they were in serious financial straits, threatened with bankruptcy, and he felt in honor bound, in view of his statements to Thomas, to protect them. This party declined to receive the rugs upon the ground that he had no authority to do so, but anyway, the rugs undisposed of were at once crated and shipped back to Thomas & Company and credit was given by them to the bankrupt for the invoice thereof upon the account.

The petition in bankruptcy was filed early in May, 1913, and in September, 1913, Thomas & Company filed a claim against the estate for $996.26, the balance due upon the purchase price of the rugs after crediting the amount returned. Thereafter objection to the claim was made by the trustees upon the ground that Thomas & Company had received a voidable preference through the return of the rugs, which preference must be returned to the trustees before allowance of a claim for the balance. On this objection being made Thomas & Company asked leave, before the Referee, to withdraw their claim, and, in support thereof, urged they were not advised of the alleged fraudulent representation made by Philip

Gevurtz at the time of the sale. They were allowed to withdraw their claim. Subsequently they filed this petition to be allowed to liquidate their claim.

CONCLUSIONS OF LAW.

Upon the foregoing facts, I am of the opinion that this petition should be denied, for two reasons:

The first is that proof of fraud upon the part of the bankrupt's officers is insufficient. In order to be allowed to liquidate its claim, the result of the transaction must be such as to create the right in the Thomas Company to rescind this sale for fraud and reclaim the goods. Such a proceeding is not favored, and, to support it, the proof must be clear, either that the bankrupt falsely represented solvency when in fact it was insolvent, or, being solvent, falsely represented the extent of its assets, in each case for the purpose of obtaining credit. In this case there does not appear to have been any representation as to solvency. The representation, such as was made, was rather as to the bankrupt's ability to pay. This might be construed to involve a representation as to the extent of the assets, but, if so, I think there is no question but that Philip Gevurtz stated conditions frankly and believed, and had reasonable expectations, that the bankrupt would be able to pay for these goods. Under such conditions, as I understand it, the right to rescind does not exist.

In re Burk, 25 Am. B. R. 170;
In re Roalswick, 110 Fed. 639;
In re Davis, 112 Fed. 294.

Again, Thomas & Company, at the time they filed their claim for the balance due on the purchase price

of the rugs, placed themselves in the position of a creditor and thus lost the right to rescind, if it ever existed. If they did not then know of the alleged falsity of the representations made by Philip Gevurtz as to the acquisition of $100,000, they were, and for a long time had been, in possession of such facts as to put them upon inquiry concerning the same, which in law amounts to the same thing. They were aware that within a very short time after the representation was made the concern became bankrupt, and that this would not have happened had the boasted relief been forthcoming. They knew that Philip Gevurtz insisted, by telephone and otherwise, that they allow him to make good his word guaranteeing payment by taking back the rugs; that, in order to do so, he actually did ship them, that they had long since received them and that they had given bankrupt credit on account of them. Knowing all these circumstances, and being bound to take them into consideration, it does not seem to me that they were unadvised of the alleged falsity of Gevurtz's representations at the time they filed their claim before the referee, and that in so doing, they elected between their remedies and elected to become a creditor. Having done so, they cannot now change their position and attempt to rescind the sale upon the ground of fraud.

In re Droege v. Ahiens etc. Mfg. Co., 163 N. Y. 466;

In re Hildebrandt, 129 Fed. 992.

It is therefore recommended that the petition of Howard D. Thomas & Company to liquidate their claim be denied.

I hand up with this Report for the consideration of the Court, the following documents considered upon this hearing:

1. Petition of Howard D. Thomas & Company to liquidate their claim.
2. Motion of trustees to dismiss petition.
3. Two parcels of testimony in connection with the hearing on the Thomas claim."

VI.

That thereafter petitioner filed its Exceptions to said report as follows (omitting heading and formal parts):

(Exceptions to Master's Report.)

"Petitioner, Howard D. Thomas & Company, a corporation, files herewith its exceptions to the report of the Special Master on its application for leave to liquidate its claim herein.

Exceptions to Findings of Fact.

Petitioner excepts to the failure of said report to find as a fact that at the time the rugs were ordered of petitioner by the above-named bankrupt, negotiations for settlement with its creditors were pending and bankrupt's affairs were under the supervision of a creditor's committee; that the rugs were necessary for the bankrupt's continuance as a going concern and were ordered with the said committee's consent under a distinct provision that they be paid for or returned to petitioner.

Petitioner also excepts to the failure of said report to find as a fact that at the time petitioner filed its claim, and up until the hearing of objections thereto

it had no knowledge or reason to believe that the statement of bankrupt that it had effected arrangements with the First National Bank of Portland, Oregon, was false; that petitioner made no conscious election with full knowledge of the facts until shortly before it filed its petition to withdraw its claim as a general creditor; that neither any delay of petitioner nor any other action of petitioner, resulted in an injury to any third party or altered the position of any one affected thereby.

Exceptions to Conclusions of Law.

Petitioner excepts to the statement by the Special Master of the law with regard to right of rescission for fraud and contends that the report should have found that where a contract is induced by a statement of material fact, made as of his own knowledge by one in a position to know its truth or falsity, and the statement is believed and relied on by the other party to his damage, and is not true, that the transaction is fraudulent as a matter of law and the innocent party may rescind; petitioner contends that this general statement is applicable to the facts found by the Master and to the additional facts hereinbefore set forth, and renders it proper to permit petitioner herein to to liquidate its claim.

Petitioner excepts to the conclusion with reference to an alleged election of remedies and contends that the equitable doctrine is that an election is binding only where made with full knowledge of all the facts, or where on the basis of estoppel it would be inequitable to permit a change of position because of the

interests of third parties; and that the conclusion here should have been that petitioner made no conscious election with full knowledge and it would be inequitable and harsh and productive of injustice to hold that petitioner is barred by a technical election."

VII.

That on January 11, 1915, the said District Court entered the following Order overruling said Exceptions and confirming said Report (omitting heading and formal parts) as follows:

(Order Confirming Master's Report.)

"This cause was heard upon the exceptions filed by Howard D. Thomas Company to the findings of the Special Master upon the petition of said Howard D. Thomas Company to liquidate their claim against the estate of the above-named bankrupt; and was argued by Mr. Roscoe C. Nelson, of counsel for said creditor, and by Mr. C. A. Bell, of counsel for the trustees of the estate of the said bankrupt, in consideration whereof it is ORDERED AND ADJUDGED that the findings of the said Special Master be and the same are hereby affirmed, and that the petition of said Howard D. Thomas Company to liquidate their said claim be and the same is hereby denied."

No opinion was rendered by the Court in said matter, save a formal announcement that the order would be entered.

VIII.

That said order was erroneous in matter of law, in that the conclusions of law by the Special Master from the Findings of Fact, and the confirmation

thereof by the District Court were incorrect in the following respects:

1. That the Master and the Court having found as a matter of fact that the shipment of goods by Howard D. Thomas Company had been induced by a misstatement of material fact, made as of his own knowledge by the President of the bankrupt concern, who was in a position to know its truth or falsity, and that the statement was believed by and relied on by Howard D. Thomas Company to its damage, should have concluded as a matter of law that Howard D. Thomas Company had the right to rescind.

2. That the Master and the Court should have concluded as a matter of law from the facts found that, inasmuch as the so-called election was not made with full knowledge of the facts, and no change of position had occurred and no interests of third parties had intervened, no principle of estoppel should be invoked and no technical doctrine of election should be held to bar petitioner in this proceeding; that the conclusion that the principle of election should be invoked not only where the party has actual knowledge, but where he can be charged with knowledge which diligence would have enabled him to obtain, is erroneous and inequitable.

That all of the reasons and points above set forth were raised in the Exceptions to the Master's Report and insisted upon and argued before the said District Court of the United States.

WHEREFORE, your petitioner prays that the order of the District Court of the United States for the District of Oregon overruling the Exceptions of

Petitioner to the Report of the said Special Master, which order was entered on the 11th day of January, 1914, may be revised and reviewed in matter of law by your Honorable Court, as provided by Section 24b of the Bankruptcy Act of 1898, and the rules and practice thereunder in such cases made and provided, and that said Order be set aside and held for naught, with such directions to the District Court of the United States for the District of Oregon as to this Court may seem proper.

Dated this 4th day of February, 1915.

HOWARD D. THOMAS COMPANY,
Petitioner.
By ROSCOE C. NELSON,
Its Attorney.

BEACH, SIMON & NELSON,
Solicitors for Petitioner.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, Roscoe C. Nelson, being first duly sworn, say: That I am one of the attorneys for the petitioner herein, and have knowledge of the facts stated in the foregoing petition and same are true as I verily believe.

ROSCOE C. NELSON.

Subscribed and sworn to before me this 4th day of February, 1915.

[Seal] LAURA N. TAPSCOTT,
Notary Public for Oregon.

Admission of Service of Petition for Revision.

State of Oregon,
County of Multnomah,—ss.

Due and timely service of the within Petition for Revision and the receipt of a duly certified copy thereof, all at the City of Portland, in said County and State, is hereby admitted, February 4th, 1915.

C. A. BELL,
Attorneys for Trustees in Bankruptcy of I. Gevurtz & Sons.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of I. Gevurtz & Sons, Bankrupt. Petition for Revision of the Order Refusing Howard D. Thomas Company Permission to Liquidate Claim.

In the United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of I. GEVURTZ & SONS, Bankrupt.

Notice of Filing Petition for Review.

CLAIM OF HOWARD D. THOMAS COMPANY.

To Messrs. Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, Trustees in Bankruptcy Herein, and to Messrs. Reed & Bell, Their Attorneys:

You are hereby notified that on the 9th day of February, 1915, we will file in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California, a Petition for Review in the above-entitled

cause, a copy of which Petition is hereto attached as part of this notice, and we will then ask to have the case docketed and the necessary orders made therein to have same set down for hearing.

Dated this 3d day of February, 1915.

BEACH, SIMON & NELSON,

Solicitors for Petitioner, Howard D. Thomas Company.

[Admission of Service of Notice of Filing of Petition for Revision, etc.]

State of Oregon,
County of Multnomah,—ss.

Due and timely service of the within Notice of Filing Petition for Revision, etc., and the receipt of a duly certified copy thereof, all at the City of Portland, in said County and State, is hereby admitted, Feb. 4th, 1915.

C. A. BELL,

Attorneys for Trustees in Bankruptcy of I. Gevurtz & Sons.

[Endorsed]: No. 2569. United States Circuit Court of Appeals for the Ninth Circuit. Howard D. Thomas Company, a Corporation, Petitioner, vs. Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, as Trustees in Bankruptcy of the Estate of I. Gevurtz & Sons, Bankrupt, Respondents. In the Matter of I. Gevurtz & Sons, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in

Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

Filed February 8, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2569

United States

Circuit Court of Appeals

For the Ninth Circuit.

HOWARD D. THOMAS COMPANY, a Corporation,

Petitioner,

vs.

WM. H. BEHARRELL, WM. C. ALVORD and ELLIOTT CORBETT, as Trustees in Bankruptcy of the Estate of I. GEVURTZ & SONS, Bankrupt,

Respondents.

MOTION OF TRUSTEES TO DISMISS, AND ANSWER OF TRUSTEES TO PETITION FOR REVISION

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of I. GEVURTZ & SONS, Bankrupt.

Answer of the Trustees (Hereinafter Referred to as Respondents) to the Petition of Howard D. Thomas Company for Revision of Order Refusing Permission to Liquidate Claim.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now W. C. Alvord, W. H. Beharrell and E. R. Corbett, the duly appointed, qualified and acting trustees in the above-entitled matter, and for answer to the petition of the Howard D. Thomas Company for revision of the order of the District Court of the United States for the District of Oregon made and entered on the 11th day of January, 1915, move, admit and allege as follows, to wit:

Move the Court for an order dismissing said petition upon the ground that the matters and things therein set forth constitute a controversy arising in bankruptcy proceedings, and as such is appealable under section 24A, or subdivision 3 of section 25 of the National Bankruptcy Act of 1898.

Further answering your respondents herein

I.

Admit paragraph I of said petition.

II.

Admit paragraph II of said petition, except that your respondents allege that said petition to with-

draw was filed under the circumstances and conditions as set forth and alleged in the answer of the trustees in re the petition of the Howard D. Thomas Company to liquidate its claim filed with the referee in bankruptcy for the above-named district on the 18th day of March, 1914, which answer is hereinafter set out in full.

III.

Admit paragraph III of said petition to revise.

IV.

Admit paragraph IV of said petition to revise, but allege the fact to be that upon the hearing before the referee on said motion to dismiss, the same was overruled, and thereafter there was filed with the referee the answer of trustees to the petition of said Howard D. Thomas Company set forth in paragraph III of the petition for revision before this court, which answer (omitting heading and formal parts) is in words and figures as follows, to wit:

[Answer to Petition for Leave to Liquidate Claim Against Bankrupt.]

I.

Admit paragraph I of said petition.

II.

Say they have no knowledge or information sufficient to form a belief as to whether the facts set out in paragraph II are true or otherwise, and therefore deny the same.

III.

Deny paragraph III and the whole thereof.

IV.

Deny paragraph IV and the whole thereof.

V.

Deny paragraph V and the whole thereof, except that it is specifically admitted that the reasonable value of the rugs as shipped was three thousand nine hundred seven and 36/100 dollars ($3,907.36).

VI.

Deny paragraph VI and the whole thereof, except that it is specifically admitted that the petitioner herein filed its proof of claim for nine hundred ninety six and 26/100 dollars ($996.26) in the above-entitled estate, and that the same was objected to by the trustees in bankruptcy upon the grounds that the petitioner had received a preference, and specifically admit that the said Howard D. Thomas attended the taking of testimony on said objections to said claim at the office of Chester G. Murphy, Esq., Referee in Bankruptcy, to whom the cause had been referred.

VII.

With reference to paragraph VII the trustees say that they have no knowledge or information sufficient to form a belief as to whether the facts set out in said paragraph are true or otherwise, and therefore deny the same.

VIII.

Deny paragraph VIII and the whole thereof.

And for a further and separate answer to the petition to liquidate claim heretofore filed herein, the trustees heretofore named respectfully represent:

I.

That they are the duly appointed, qualified and acting trustees herein.

II.

That the petitioner was at all times herein mentioned and still is a corporation organized and existing under and by virtue of the laws of the State of Washington.

III.

That in the month of April, 1913, the petitioner sold and delivered to I. Gevurtz & Sons, the abovenamed bankrupt, rugs of the value of three thousand nine hundred seven and 36/100 dollars ($3,907.36).

IV.

That at the time of said sale petitioner was notified by the said bankrupt that it was negotiating for sufficient advance from the bank to take care of all small outstanding bills and preferred claims, and that I. Gevurtz & Sons would be in a position to pay for the rugs in the usual course.

V.

That said rugs were thereupon sold and delivered to I. Gevurtz & Sons.

VI.

That I. Gevurtz & Sons was duly adjudged bankrupt on the 9th day of May, 1913; that a few days prior to said adjudication, said Philip Gevurtz, president of I. Gevurtz & Sons, notified petitioner that I. Gevurtz & Sons was to be declared bankrupt or go into voluntary bankruptcy, as the case might be, and that I. Gevurtz & Sons desired to return the rugs heretofore sold and delivered to it by petitioner.

VII.

That an agent of the said Howard D. Thomas Co.

came to the City of Portland at the request of I. Gevurtz & Sons for the purpose of negotiating for the return of said rugs, and that the said Howard D. Thomas Company was notified of the financial condition and situation surrounding I. Gevurtz & Sons, and that said I. Gevurtz & Sons offered to return said rugs, but the said Howard D. Thomas Company then and there elected to stand upon its contract and refused to accept said offer of return, and stated that any return of said rugs must be upon the responsibility of I. Gevurtz & Sons.

VIII.

That thereafter the said I. Gevurtz & Sons on their own responsibility shipped said rugs to the said Howard D. Thomas Company at Seattle, Washington, and the same were accepted by the said Howard D. Thomas Company, and credit was given upon the purchase price.

IX.

That thereafter, and on the —— day of 1913, the said Howard D. Thomas Company with full knowledge of all circumstances surrounding the sale of said rugs, and full knowledge of the failure of I. Gevurtz & Sons, and with full knowledge of its general financial condition, again elected to stand upon said contract of sale, and gave I. Gevurtz & Sons credit on account of said contract in the sum of two thousand nine hundred eleven and 60/100 dollars ($2,911.60), the alleged value of the rugs returned, and presented its verified claim for the balance due on said contract of sale to the referee herein. That in fact the true value of the rugs returned was three

thousand six hundred twelve and 15/100 dollars ($3,612.15).

X.

That thereafter, and prior to October 12, 1913, the said Howard D. Thomas attended at Portland, Oregon, the taking of testimony in re said claim for balance due; that at the taking of testimony, Beach, Simon & Nelson, the legal representatives of the said Howard D. Thomas Company (who were at the time of the sale of said rugs and at the time of bankruptcy of said concern the attorneys for I. Gevurtz & Sons, and still are the attorneys for I. Gevurtz & Sons) for and on behalf of the said Howard D. Thomas Company again elected to stand on said contract, and with full knowledge of all the facts surrounding the said sale and surrounding the bankruptcy of I. Gevurtz & Sons, and the reasons therefor, presented testimony on behalf of said Howard D. Thomas Company to substantiate its claim for balance due, which testimony was filed with the referee herein on the 12th day of October, 1913.

XI.

That the referee herein took the matter under consideration and thereafter, and on the 25th day of October, 1913, a brief was filed by the trustees herein in which authorities were cited showing that the filing of said claim and the standing on said contract constituted an election.

XII.

That some time subsequent to the filing of said brief, to wit, on the 22d day of November, 1913, counsel for the Howard D. Thomas Company filed

a motion with the referee in the above-entitled matter asking leave to withdraw said claim, which after argument by counsel was on the 14th day of January, 1914, granted by the referee herein, and that thereafter, and on the 28th day of January, 1914, a petition to liquidate the alleged claim was filed in the United States Court.

WHEREFORE, the trustees pray for an order of this court dismissing said petition to liquidate said claim.

Further answering paragraph IV of said petition for revision your respondents allege the fact to be that the findings of fact and conclusions of law of the special master set forth in the report of the special master shown in paragraph V of the petition for revision were based upon the testimony taken under the issues raised by the petition to liquidate set forth in paragraph III of the petition for revision, and the answer above set out, and that said report of the special master containing his statements of fact and conclusions of law was not based upon the motion to dismiss;

Your respondents further allege the fact to be that by inadvertence the said A. M. Cannon, referee in bankruptcy, acting as special master, failed in his report as such special master to refer back to the District Court said answer, but that in fact the arguments before the District Court upon the exceptions to the report of the special master were based upon the testimony taken on the issues made by reason of said petition to liquidate and the answer above set forth, and your respondents further allege that the

said A. M. Cannon has certified to the District Court the said answer referred to and set out in this paragraph as a part of the record in this matter.

V.

Admit paragraph V of said petition to revise.

VI.

Admit paragraph VI of said petition to revise.

VII.

Admit paragraph VII of said petition to revise.

VIII.

Answering paragraph VIII of said petition for revision your respondents allege the fact to be that said order of the District Court was not erroneous as a matter of law;

Further answering subdivision one (1) of said paragraph VIII your respondents deny that the master and court found as a matter of fact that the shipment of goods by Howard D. Thomas Company had been induced by misstatement of material facts made as of his own knowledge by the president of the bankrupt concern;

Further answering subdivision two (2) of said paragraph VIII your respondents deny that the election of the petitioner as found by the special master and the District Court was not made with full knowledge of the facts, and allege the fact to be that said election was made with full knowledge of the facts, and that the findings of the referee and the District Court so held.

WHEREFORE, your respondents pray

(1) For an order dismissing said petition for revision;

(2) For an order of this Court sustaining the order of the District Court of the United States for the District of Oregon overruling the exceptions of petitioner Howard D. Thomas Company to the report of the special master.

Dated this 11th day of February, 1915.

W. H. BEHARRELL.
E. R. CORBETT.

C. A. BELL,
Solicitor for Petitioners.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, C. A. Bell, being first duly sworn, say: That I am attorney for the respondents herein, and have knowledge of the facts stated in the foregoing answer, and said facts are true as I verily believe.

C. A. BELL.

Subscribed and sworn to before me this 11th day of February, 1915.

[Seal] ETHEL C. GRAHAM,
Notary Public for Oregon.

[Admission of Service of Answer to Petition for Revision.]

State of Oregon,
County of Multnomah,—ss.

Service of the foregoing Answer by copy as prescribed by law, is hereby admitted, at Portland, Oregon, this 16 day of February, 1915.

BEACH, SIMON & NELSON,
Attorney for ————.

[Endorsed]: Docketed. No. 2569. United States Circuit Court of Appeals for the Ninth Circuit. Howard D. Thomas Company, a Corporation, Petitioner, vs. Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, as Trustees in Bankruptcy of the Estate of I. Gevurtz & Sons, Bankrupt, Respondents. Motion of Trustees to Dismiss, and Answer of Trustees to Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

Filed February 18, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.